

Unfair contracts— the proposal explained



The Australian Consumer Law will deal with unfair contract terms in standard form consumer contracts.

The new law will define what an unfair contract term (UCT) is and what a court must take into account when determining whether a contract term is unfair.

If a court determines that a term in a contract is unfair, it may declare the term void, which means it would no longer be enforceable in that consumer's contract.

Standard form contracts are common and used for many services, including internet services, hire cars, gym memberships and mobile phones. They are often offered on a take-it-or-leave-it basis.

UCT laws already exist in Victoria and in some overseas jurisdictions such as the United Kingdom.

How might it work?

The UCT provision is significant because it focuses on substantive unfairness in consumer markets, complementing the unconscionable conduct provisions in the Trade Practices Act.

The provision will allow the ACCC to address situations where consumers typically cannot bargain or vary the process of sale or contract formation.

For the UCT provision to apply the term must be 'unfair' according to the Australian Consumer Law and the contract must be a standard form consumer contract. Should a supplier allege that the contract at issue is not a standard form contract, the onus will be on them to prove this is the case.

The following factors will be relevant in determining whether a term is unfair:

- whether it causes a significant imbalance in the parties' rights
- whether it is reasonably necessary to protect the legitimate interests of the party
- the extent to which the term would cause, or would be substantially likely to cause, detriment
- the extent to which the term is transparent (although transparency alone cannot overcome underlying unfairness)
- the contract as a whole.

Types of terms that may be unfair

The proposed legislation sets out a range of terms in standard form contracts that may be unfair. These include where only one party:

- is able to avoid or limit performance of the contract
- is able to terminate the contract
- faces penalties for breach or termination of the contract
- is allowed to vary the terms of a contract.

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Declarations and redress

Only a court can declare a contract term to be unfair.

Declarations and redress will be available where a court finds that a term is unfair. No pecuniary penalties or disqualification orders will apply.

Guidance for business and consumers

The ACCC, the Australian Securities and Investments Commission and state and territory fair trading agencies are developing a national guide on UCTs. This guide will be made available in 2010.